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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ELIJAH BAER, JOSHUA BAYANGOS,
RONALD GRUEL, ISAIAH HAMPTON,
NATHAN JOHNSON,
CHANDRASEKAR KUPPUCHAMY,
DEREK LEWIS, DESERIE MARTIN,
JOSEPH MARTINEZ, MAYRENI
MORALES, SHONTAE STEPHENS,
SIENNA STEPHENS, RUDY VALDEZ,
JATEL VERCHER, and KAYLA
WILLIAMS, individually, and on behalf
of all others similarly situated, and on
behalf of the State of California and other
aggrieved persons,

Plaintiffs,

V.

TESLA MOTORS, INC., a California corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No. 23-cv-02274-YGR

[Assigned to the Hon. Yvonne Gonzalez Rodgers]

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
ORDER REMANDING ACTION
TO STATE COURT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: July 18, 2023
Time: 2:00 pm
Courtroom: 1

State Action Filed: December 30, 2022
State FAC Filed: February 23, 2023
Removal Date: May 10, 2023

[Filed concurrently with: (Proposed) Order]

Trial date: Not set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 18, 2023 at 2:00 p.m., or as soon thereafter as the matter can be heard in Courtroom 1 of the above-referenced court, located at Oakland Federal District Courthouse, 1301 Clay Street, Courtroom 1, Fourth Floor, Oakland, California 94612. Plaintiffs, individually and on behalf of all others similarly situated, will and hereby do move this Court for an Order remanding the instant Action back to the state court in which it was originally filed. This Motion will be based on this Notice and the Memorandum of Points and Authorities filed concurrently herewith, the Proposed Order lodged concurrently herewith, the complete files and records in this action, and all other matters and evidence that may be presented at the hearing on this Motion.

Plaintiffs move this Court to remand this Action back to the State Court where it belongs, and that the Clerk of the Court send a certified copy of the Order to the clerk of the State Court where the Action was originally filed, because this Court lacks subject matter jurisdiction over the Action under Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. §§ 1332(d), on the grounds that Defendant cannot demonstrate that the amount-in-controversy exceeds \$5,000,000.

Respectfully submitted,

Dated: June 9, 2023

WILSHIRE LAW FIRM

By: /s/ Jeffrey C. Bils
Jeffrey C. Bils

Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND BACKGROUND

Court after court in this Circuit has held that a removing defendant cannot establish the requisite amount-in-controversy for subject-matter jurisdiction under the Class Action Fairness Act of 2005 (“CAFA”)¹ merely by “plucking a violation rate out of the air and calling it reasonable”² — yet this is precisely what Defendant Tesla Motors, Inc. (“Defendant” or “Tesla”) attempts to do here. Worse still, Defendant removes this Action on the basis of language that is not found in Plaintiffs’ First Amended Complaint (“FAC”) [Dkt. No. 1-1].

This year alone, in two Central District of California cases, the Court has remanded class actions after determining that the limiting language in the operative complaint — each similar to the FAC here, and each filed by the same Plaintiffs’ counsel — did not support the defendant’s assumed violations rates. *See Arias v. Shyft Grp. GTB, LLC*, No. CV 23-1582-JFW(DFMX), 2023 WL 3559311, at *2-3 (C.D. Cal. May 17, 2023); *Peters v. TA Operating LLC*, No. EDCV221831JGBSHKX, 2023 WL 1070350, at *5 (C.D. Cal. Jan. 26, 2023).

In its Notice of Removal (“NOR”) [Dkt. No. 1], Defendant strains unsuccessfully to meet the \$5 million threshold by assuming unfounded violation rates just as in these previously remanded actions. Specifically, Defendant asserts that ***100% of Class members*** whose employment was terminated more than 30 days before the present date are owed 100% of the potential waiting-time penalties under

¹ 28 U.S.C. §§ 1332(d) .

² *See, e.g., Sanchez v. Vanderlande Indus., Inc.*, No. CV 23-531-JFW(MAAX), 2023 WL 2862288, at *4 (C.D. Cal. Apr. 10, 2023); *Ryan v. Mission Treatment Servs., Inc.*, 2022 WL 4331093, at *3 (C.D. Cal. Sept. 19, 2022) (quoting *Gonzalez v. H & M Hennes Mauritz L.P. et al.*, 2022 WL 179292, at *4 (C.D. Cal. Jan. 20, 2022)); *see also Toribio v. ITT Aerospace Controls LLC*, 2019 WL 4254935, at *3 (C.D. Cal. Sept. 5, 2019); *Vanegas v. DH Express (USA), Inc.*, 2021 WL 1139743, at *4 (C.D. Cal. Mar. 24, 2021); *Koreisz v. On Q Fin., Inc.*, 2018 WL 6567694, at *3 (C.D. Cal. Dec. 12, 2018).

1 California Labor Code section 203. [NOR, ¶ 33.] Additionally, Defendant asserts
 2 that Class members suffered meal period violations and rest break violations during
 3 20% of eligible shifts. [NOR, ¶¶ 26, 30.]

4 Defendant offers nothing to evidence its wholly unsubstantiated and plainly
 5 unreasonable assumptions, including the violation rates at issue. Therefore,
 6 Defendant cannot meet the requisite \$5 million amount-in-controversy to establish
 7 jurisdiction under CAFA, and this Court must remand.

8 **II. DEFENDANT MUST SHOW BY PREPONDERANCE OF THE**
EVIDENCE THAT FEDERAL REMOVAL JURISDICTION EXISTS

9 By statute, removal is proper when the federal courts have original jurisdiction
 10 over an action brought in state court. *See* 28 U.S.C. § 1441(a). Because the right to
 11 remove an action to federal court on the basis of diversity of citizenship is “a creature
 12 of statute,” the long-standing rule is that “a suit commenced in a state court must
 13 remain there until cause is shown for its transfer under some act of Congress.”
 14 *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 28-29 (2002) (quoting *Great*
 15 *N. R. Co. v. Alexander*, 246 U.S. 276, 280 (1918)).

16 The burden of establishing grounds for federal jurisdiction rests with the party
 17 seeking removal. *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004).
 18 The removing party must prove, by a preponderance of evidence, actual facts
 19 necessary to support the petition for removal. *See Gaus v. Mile, Inc.*, 980 F.2d 564,
 20 566-567 (9th Cir. 1992); *accord Luther v. Countrywide Home Loans Servicing, LP*,
 21 533 F.3d 1031, 1034 (9th Cir. 2008) (holding that the “defendant seeking removal
 22 ... has the burden to establish that removal is proper and any doubt is resolved against
 23 removability”). On a motion for remand, the non-moving party must identify “a
 24 legitimate source of the court’s jurisdiction,” and “[d]isputed questions of fact and
 25 ambiguities in the controlling law must be resolved in favor of the remanding party.”
 26 *Pac. Mar. Ass’n v. Mead*, 246 F.Supp.2d 1087, 1089 (N.D. Cal. 2003).

27 Congress enacted CAFA, a statute specifying grounds for removal of state
 28

court class action litigation to federal court, intending that it be applied in harmony with this general rule. *See Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021 (9th Cir. 2007) (“[When enacting CAFA], Congress intended to maintain the historical rule that it is the proponent’s burden to establish a *prima facie* case of removal jurisdiction”). Under CAFA, “the burden of establishing removal jurisdiction is, as it was before CAFA, on the party wishing to see the case in federal court.” *Lewis v. Verizon Commc’ns, Inc.*, 627 F.3d 395, 399 (9th Cir. 2010) (citing *Abrego Abrego v. Dow Chem Co.*, 443 F.3d 676, 685 (9th Cir. 2006)); *see also Korn v. Polo Ralph Lauren Corp.*, 536 F.Supp.2d 1199, 1206 (E.D. Cal. 2008) (“[T]he removing party bears the burden of establishing federal jurisdiction under the CAFA ...”).

“A defendant seeking removal of a putative class action must demonstrate, **by a preponderance of the evidence**, that the aggregate amount in controversy exceeds the jurisdictional minimum.” *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 981 (9th Cir. 2013) (emphasis added); *see also Dart Cherokee Basin Operating Co., LLC v. Owens* [“*Dart Cherokee*”] 574 U.S. 81, 89 (2014) (holding that a defendant asserting removal jurisdiction **must** proffer “[e]vidence establishing the amount [in controversy]” when “the plaintiff contests, or the court questions, the defendant’s allegations”). The Ninth Circuit has held on more than one occasion that “mere speculation and conjecture, with unreasonable assumptions” cannot support removal jurisdiction. *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197-1198 (9th Cir. 2015); *see also Harris v. KM Indus., Inc.*, 980 F.3d 694, 700 (9th Cir. 2020); *Vasserman v. Henry Mayo Newhall Mem. Hosp.*, 65 F.Supp.3d 932, 982 (C.D. Cal. 2014) (ruling that a defendant may not “improperly shift the burden to plaintiff to refute speculative assertions of jurisdiction and establish that there is no jurisdiction.”). To the extent that the proponent of removal must resort to assumptions in its “chain of reasoning” supporting its calculation of the total amount-in-controversy, such assumptions “cannot be pulled from thin air, but need some reasonable ground underlying them.” *Dobbs v. Wood Grp. PSN, Inc.*, 201 F.Supp.3d

1 1184, 1188 (E.D. Cal. 2016) (quoting *Ibarra*, 775 F.3d at 1199); *see also Arias v.*
 2 *Residence Inn by Marriott*, 936 F.3d 920, 927 (9th Cir. 2019).

3 **III. NO CREDIBLE, SUMMARY JUDGMENT-TYPE EVIDENCE SHOWS**
 4 **THE REQUISITE \$5 MILLION AMOUNT-IN-CONTROVERSY**

5 To establish CAFA jurisdiction, Defendant must prove, *inter alia*, that the
 6 aggregate amount-in-controversy exceeds \$5,000,000, exclusive of interest and
 7 costs. It has failed to do so because it has only pulled assumed violation rates from
 8 thin air.

9 “In determining the amount in controversy, courts first look to the complaint.”
 10 *Ibarra, supra*, 775 F.3d at 1197. If the pleading does not facially specify an amount-
 11 in-controversy, the removing party “may submit evidence outside the complaint,
 12 including affidavits or declarations, or other ‘summary judgment-type evidence
 13 relevant to the amount in controversy at the time of removal.’” *Id.* (quoting *Singer v.*
 14 *State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1977)). This prevents a
 15 defendant from attempting to establish federal jurisdiction “by mere speculation and
 16 conjecture, with unreasonable assumptions.” *Id.* at 1197-1198. Instead, “[w]here the
 17 complaint contains generalized allegations of illegal behavior, a removing defendant
 18 must supply ‘real evidence’ grounding its calculations of the amount in controversy.”
 19 *Dobbs, supra*, 201 F.Supp.3d at 1188. In short, any assumptions made by Defendant
 20 ***“cannot be pulled from thin air but need some reasonable ground underlying***
 21 ***them.” Ibarra, supra***, 775 F.3d at 1199; *see also Peters, supra*, 2023 WL 1070350,
 22 at *5 (remanding after determining that the limiting language in the complaint —
 23 similar to the FAC in this instant action and filed by the same Plaintiffs’ counsel —
 24 did not support the defendant’s assumed violations rates, and noting, “what matters
 25 is the depth of the factual support provided by a defendant and the chain of reasoning
 26 it uses to reach its estimate”); *see also Arias, supra*, 2023 WL 3559311, at *2-3
 27 (remanding after determining that the limiting language in the complaint — similar
 28 to the FAC in this instant action, filed by the same Plaintiffs’ law firm — did not

1 support the defendant's assumed violations rates).

2 Where "a defendant provide[s] *no* evidence or clearly inadequate evidence
 3 supporting its valuation for a claim," the Ninth Circuit has held it "might be
 4 appropriate for a district court to assign that claim a \$0 value." *Jauregui v.*
 5 *Roadrunner Transp. Servs., Inc.*, 28 F.4th 989, 994 (9th Cir. 2022); *Smith v. Diamond*
 6 *Resorts Mgmt.*, 2016 WL 356020, at * 5 (C.D. Cal. 2016) (rejecting defendant's
 7 violation rate of one hour of overtime per week because defendants failed to show
 8 how often plaintiffs and class members performed overtime work).

9 Here, Plaintiffs' FAC does not specify an amount of damages. [See generally
 10 FAC, Dkt. No. 1-1.] Thus, to overcome Plaintiffs' challenge, Defendant must show
 11 by a preponderance of the evidence that the amount-in-controversy is satisfied (*i.e.*,
 12 that it is more likely than not that the amount-in-controversy exceeds \$5,000,000).
 13 Providing evidence should not be particularly difficult for Defendant, especially
 14 because it is required under California law to create and maintain wage records that
 15 could be used to calculate an amount-in-controversy in this wage-and-hour class
 16 action. *See, e.g.*, Cal. Lab. Code § 226(a). Yet Defendant presents ***no*** evidence
 17 supporting its purported amount-in-controversy. [See generally NOR, Dkt. No. 1.]
 18 Defendant submits no evidence outside the FAC, no affidavits or declarations, no
 19 summary judgment-type evidence at all relevant to the amount-in-controversy at the
 20 time of removal. Defendant fails to proffer a basis in any data whatsoever for the
 21 variables used in calculating the alleged amount-in-controversy, not for the alleged
 22 average hourly rate of pay, the alleged average number of hours worked per day, the
 23 alleged number of class members, the alleged violation rates for meal period and rest
 24 break violations, or the alleged amount of penalties class members are entitled to
 25 under California Labor Code section 203. [*Id.*]

26 As such, Defendant's assumed violation rates lack factual support, and the
 27 clear weight of decisional authority favors discounting and "zeroing out" its
 28 unfounded and unsupported calculations. *See Jauregui, supra*, 28 F.4th at 994. Even

1 if the Court looks past Defendant's non-existent evidence, Defendant *still* fails to
 2 establish the amount-in-controversy via any reasonable chain of assumptions. The
 3 question of whether a removing defendant's assumptions are reasonable "generally
 4 does not rest on whether the defendant has picked a low enough number." *Peters*,
 5 *supra*, 2023 WL 1070350, at *5. Even "a 1% violation rate [may be] unreasonable
 6 ...; what matters is the depth of the factual support provided by a defendant and the
 7 chain of reasoning it uses to reach its estimate." *Id.* As such, the Court should reject
 8 *any* assumed violation rate absent evidentiary support.

9 A. **Defendant's Meal Period and Rest Break Violation Calculations**
 10 **Rely on Speculative Assumptions and Are Thus Unreasonable**

11 In its Notice of Removal, Defendant quotes purported language from the FAC
 12 that is not actually in the FAC. As such, Defendant's amount-in-controversy
 13 calculation *directly contradicts the plain language of the First Amended*
 14 *Complaint*. Plaintiffs are "'the master of the claim' and may avoid federal
 15 jurisdiction by pleading different facts." *Arreola v. Finish Line*, 2014 WL 6982571,
 16 at *4 (N.D. Cal. Dec. 9, 2014) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386,
 17 392 (1987)). Thus, "[a]n assumption may be reasonable *if it is founded on the*
 18 *allegations of the complaint.*" *Arias, supra*, 936 F.3d at 925 (emphasis added).

19 Defendant must demonstrate that its method of calculation is based on a
 20 representative sample from admissible data, from which it "extrapolate[s] ... for the
 21 entire class." *Dobbs, supra*, 201 F.Supp.3d at 1189 (citing *LaCross v. Knight Transp.*
 22 *Inc.*, 775 F.3d 1200, 1202-03 (9th Cir. 2015)). In *Dobbs*, the complaint alleged that
 23 the defendant violated Labor Code Sections both "regularly" and as a "pattern and
 24 practice." There, the defendant submitted two reports as summary-judgement-type
 25 evidence to support its contention that the language in the complaint supported the
 26 alleged amount-in-controversy. However, *Dobbs* concluded that the evidence lacked
 27 any statistical analysis or extrapolated calculations. *Id.* As such, the evidence did not
 28 justify the defendant's unreasonable assumptions and its purely speculative amount

1 in controversy. *Id.* Here, Defendant has not even provided an evidentiary basis for
 2 its raw assumptions devoid of analysis or extrapolation.

3 Instead, Defendant mischaracterizes Plaintiffs' FAC by stating that the FAC
 4 alleges that Defendant engaged in an unlawful "policy" of failing to provide
 5 compliant meal periods and rest breaks. [NOR, ¶ 25, 29.] Relying on this purported
 6 "policy" language—which in fact does not appear in the FAC except in reference to
 7 "public policy [e.g., FAC, ¶¶ 57(e), 112] —Defendant cites a string of inapposite
 8 decisions involving allegations of "unlawful policies" and "systematic, company-
 9 wide policy." [NOR, ¶ 25, 29.] However, since Plaintiffs' FAC ***does not allege*** that
 10 Defendant's violative conduct was part of its "policy," Defendant's ground for
 11 removal does not correlate with the language of the FAC and fails on this ground
 12 alone. [See generally FAC.] []Further, Defendant erroneously asserts that a 100%
 13 violation rate is supported by Plaintiffs' allegations regarding the putative class
 14 members' inability to leave Defendant's premises during meal periods and rest
 15 breaks, as well as the difficulties the class members experienced with taking meal
 16 periods and rest breaks. [NOR, ¶ 25, 29.] Contrary to Defendant's position, Plaintiffs
 17 do not allege that Defendant committed meal period and rest break violations 100%
 18 of the time. Rather, Plaintiffs allege that Defendant maintained a "pattern and
 19 practice" of failing to provide employees with compliant meal periods and rest
 20 breaks. [FAC, ¶ 5(b), (c).]

21 The Ninth Circuit has held that alleging a "pattern and practice" of alleged
 22 violations does not necessarily mean that it is reasonable to assume that such
 23 violations were universal. *Ibarra, supra*, 775 F.3d at 1199; *see also Garza v.*
24 Brinderson Constructors, Inc., 178 F.Supp.3d 906, 911 (N.D. Cal. 2016) (holding
 25 that defendant's assumption of 100% violation rate was not reasonable where
 26 plaintiff's pleading "alleged that defendants 'maintained a policy or practice'" of
 27 violations). Such assumptions are an "unreasonable and arbitrary assumption[] to
 28 estimate the amount in controversy," and do not satisfy Defendant's burden to prove

1 that CAFA jurisdiction exists over this Action. *Duran v. Allegis Glob. Sols., Inc.*,
 2 2021 WL 3281073, at *1 (N.D. Cal. Aug. 2, 2021).

3 Moreover, Plaintiffs allege that it was Defendant's "pattern and practice" not
 4 to provide compliant meal periods or rest breaks; that Defendant's violations
 5 "***predominate***"; that Defendant's violations "hindered [class members] from
 6 determining the amounts of ... meal period premium, and rest period premium wages
 7 owed to them"; and without certification that there is a risk of "***inconsistent or***
 8 ***varying adjudications.***" [FAC, ¶¶ 5(b, c, d), 44, 45, 46, 47, 49(e), 58(b, c), 59(a),
 9 59(f)(1) (emphasis added).] Defendant disregards this consistent, limiting language
 10 of the FAC in asserting, without evidentiary support, that meal period and rest break
 11 violations place \$22,324,200 and \$22,580,800 in controversy, respectively. [NOR,
 12 ¶¶ 26, 30.] To reach these figures, Defendant manipulates the meaning of the FAC
 13 to mean that the Class Members experienced meal period violations and rest break
 14 violations in 20% of all eligible shifts. [*Id.*] These assumptions are unreasonable.
 15 Inconsistent or varying adjudications would be impossible if the Class Members all
 16 experienced exactly the same violations, as Defendant improperly asserts in its NOR.
 17 Moreover, a practice that "***predominate[s]***" and that could result in "***inconsistent or***
 18 ***varying adjudications***" does not mean the class members experienced meal period
 19 and rest break violations in 20% of all eligible shifts. Defendant's alleged violation
 20 rates are pulled from thin air and directly contrary to the FAC's plain language.
 21 **Defendant does not supply any evidence for why any meal period or rest break**
 22 **violations should be assumed to have occurred for employees on a regular basis,**
 23 **never mind such regular, universal meal period and rest break violations.**
 24 Defendant's assumptions are unreasonable, and again, based on language not found
 25 in the FAC.

26 A party *cannot* establish CAFA jurisdiction merely by "plucking a violation
 27 rate out of the air and calling it reasonable." *Ryan v. Mission Treatment Servs., Inc.*,
 28 2022 WL 4331093, at *3 (C.D. Cal. Sept. 19, 2022) (quoting *Gonzalez v. H & M*

1 *Hennes Mauritz L.P. et al.*, 2022 WL 179292, at *4 (C.D. Cal. Jan. 20, 2022)); see
 2 also *Toribio v. ITT Aerospace Controls LLC*, 2019 WL 4254935, at *3 (C.D. Cal.
 3 Sept. 5, 2019); *Vanegas v. DH Express (USA), Inc.*, 2021 WL 1139743, at *4 (C.D.
 4 Cal. Mar. 24, 2021); *Koreisz v. On Q Fin., Inc.*, 2018 WL 6567694, at *3 (C.D. Cal.
 5 Dec. 12, 2018). Courts regularly find such unsupported assumptions of even *one*
 6 meal and *one* rest break violation per week to be impermissible to establish CAFA
 7 jurisdiction:

8 As other courts in this district have held, ***Defendant may not rely on***
 9 ***statistical assumptions to sustain the amount in controversy***
 10 ***requirement.*** *Armstrong v. Ruan Trans. Co.*, EDCV 16-1143-VAP
 (SPx), 2016 WL 6267931, at *3 (C.D. Cal. Oct. 25, 2016) (remanding
 11 case in which defendant assumed one meal and rest break violation
 12 per week for the purposes of calculating amount in controversy). Courts have routinely remanded cases where amount in controversy
 13 calculations rely on speculative assumptions unsupported by evidence
 14 ... See, e.g., *Whitaker v. U.S. Renal Care, Inc.*, No. CV 17- 2661-R,
 15 2017 WL 3412203, at *2 (C.D. Cal. Aug. 8, 2017) (remanding case in
 16 which defendant assumed one meal and rest break violation per week
 17 for the purposes of calculating the amount in controversy); *Freeman*
 18 *v. Mercy Servs. Corp.*, No. 2:16-cv-01151-TLNKJN, 2017 WL
 19 2572428, at *3-4 (E.D. Cal., June 14, 2017) (remanding case in which
 20 defendant assumed one violation per pay period in calculating the
 21 amount in controversy for Plaintiff's unpaid meal and rest period
 22 claims); *Weston v. Helmerich & Payne Int'l Drilling Co.*, No. 1:13 cv-
 23 01092-LJO-JLT, 2013 WL 5274283, at *6 (C.D. Cal. Sept. 17, 2013)
 24 (rejecting amount in controversy calculations where "Defendant
 25 provides no factual underpinning for the assumption that a meal and
 rest break violation occurred one time per week or why an overtime
 violation should be presumed to occur for four hours every week");
Munoz v. Central Parking Sys., Inc., No. CV 10-6172, 2010 WL
 3432239, at *2 (C.D. Cal. Aug. 20, 2010) (rejecting defendant's
 assumption of one meal period violation per week because defendant
 "fail[ed] provide any evidentiary support for th[is] assumption[]").

26 *Salazar v. Johnson & Johnson Consumer Inc.*, 2018 WL 4560683, at *3 (C.D. Cal.
 27 Sept. 19, 2018) (emphasis added).

1 Defendant's assertions have no support in either the FAC or in any extrinsic
 2 evidence regarding the frequency of violations, or even the frequency of entitlement
 3 to meal periods and/or rest breaks. They are just as unreasonable as the purported
 4 violation rates that *Salazar* found unsupported. With respect to similar periodic
 5 language as at issue here, *Salazar* found that "Defendant sets forth no facts
 6 supporting [an] assumed violation rate of 20% (*or even 5%*), nor do Plaintiffs'
 7 allegations of 'periodic' violations point to this conclusion." *Id.* (emphasis added).

8 While *Salazar* noted that some courts have held differently on their specific
 9 facts, "these cases are distinguishable because here Plaintiffs limit the allegations in
 10 the Complaint — they assert that they and other California Class members were
 11 unable to take off duty meal breaks 'from time to time,' and that they and other
 12 California Labor Sub-Class members were 'periodically' denied their proper rest
 13 periods." *Id.* at *4. This is directly parallel to the "predominate[s]" and other limiting
 14 language Plaintiffs use here, and thus, as in *Salazar*, cases that hold differently are
 15 distinguishable and do not apply here. Defendant clearly may not assume even a 5%
 16 **violation rate** based on periodic-type language such as that alleged here. When a
 17 defendant presents such estimates as unsupported conjecture, their "arbitrary
 18 assumption does not permit the Court to find that Defendant[] ha[s] established by a
 19 preponderance of the evidence the amount in controversy...." *Id.* As the Court held
 20 in Duran:

21 [Defendant's] assumption of a once-per-week incidence of overtime
 22 and minimum wage, and meal and rest break violations is even more
 23 arbitrary. It would be just as consistent with the complaint to assume
 24 a frequency of once-per-month, or possibly once-per-quarter.
 25 [Defendant] again did not provide any extrinsic evidence to tip the
 26 analysis in its direction, or point to anything in the complaint that
 27 might do so.

28 *Duran, supra*, 2021 WL 3281073, at *3.

1 Defendant's arbitrary assumptions that the class members are owed meal
 2 period and rest break premiums for 20% of eligible shifts, each, "shows how simple
 3 it is to manipulate the assumptions to produce totals larger or smaller than the \$5
 4 million threshold." *Vanegas*, 2021 WL 1139743, at *4 (quoting *Lacasse v. USANA*
 5 *Health Sci., Inc.*, 2021 WL 107143, at *3 (E.D. Cal. Jan. 12, 2021)).

6 In sum, Defendant has proffered no evidence to support its assumptions that:

- 7 (1) the putative class is made up of at least 19,000 current and former
 employees [NOR, ¶ 17, 22];
- 9 (2) class members worked at least 8,700,000 shifts of over five hours, from
 December 30, 2018, through April 26, 2023 [*Id.* at ¶ 24];
- 11 (3) between December 30, 2018, and April 26, 2023, the putative class
 members worked at least 8,713,694 shifts of over five hours [*Id.* at ¶ 26];
- 13 (4) between December 30, 2018, and April 26, 2023, the putative class
 members worked at least 8,800,000 shifts of at least 4 hours [*Id.* at ¶ 30];
- 15 (5) the putative class members earned an \$12.83 average hourly wage rate [*Id.*
 at ¶ 26];
- 17 (6) meal period violations occurred in 20% of 8,700,000 shifts [*Id.*]; or
- 18 (7) rest break violations occurred in 20% of 8,800,000 shifts. [*Id.* at ¶ 30.]

19 As such, Defendant presents nothing but speculative and manifestly unreasonable
 20 calculations for the total amount-in-controversy for the meal period and rest break
 21 causes of action. The Court should reject these purported calculations.

22 **B. Defendant's Calculation Regarding Failure to Pay Wages Due at**
 23 **Termination is Arbitrary and Unsupported**

24 Defendant asserts, without providing a basis, that 4,790 full-time non-exempt
 25 employees in California separated their employment with Defendant more than 30
 26 days prior to its filing of the NOR. [NOR, ¶ 32.] With respect to Plaintiffs' waiting-
 27 time penalty allegation, Defendant alleges \$14,748,410 in controversy. [*Id.* at ¶ 33.]
 28 Defendant reaches this figure by assuming a 100% violation rate but, again, *provides*

1 ***no rationale whatsoever that supports its assumption of a 100% (or indeed any)***
 2 ***violation rate.*** [Id.] Defendant disregards the FAC’s plain language, which alleges
 3 not that Defendant’s failure to timely pay final wages due at termination was
 4 universal, but was instead consistent with Defendant’s “pattern and practice.” [FAC,
 5 ¶ 48.] As such, Defendant’s assumed 100% violation rate directly contradicts the
 6 plain language of the First Amended Complaint, because the allegations cannot be
 7 read to mean that the violations occurred all the time to all employees uniformly
 8 without exception.

9 The allegations in the FAC can only be read to mean that different employees
 10 faced different circumstances, not that 100% of employees had exactly the same
 11 experience. For example, the issue of whether Defendant failed to provide Class
 12 Members with timely final wages is a common question that “*predominate[s]*,” and
 13 without class certification there is a risk of “*inconsistent or varying adjudications*.”
 14 [FAC, ¶¶ 58(d), 59(f)(1) (emphasis added).] Inconsistent or varying adjudications
 15 would be impossible if 100% of Class Members all experienced exactly the same
 16 violations, as Defendant improperly assumes in its NOR. Moreover, the FAC states
 17 that the Class is entitled to recover additionally accruing wages “*for each day they*
 18 *were not paid ... up to* thirty (30) days maximum pursuant to California Labor Code
 19 § 203 — not for “every day.” [Id. at ¶ 93 (emphasis added).] The FAC also alleges
 20 that it was Defendant’s “pattern and practice” to not timely pay final wages — not
 21 that Defendant “always” failed to timely pay final wages. [Id. at ¶ 48.] Defendant’s
 22 assumption of a 100% violation rate and maximum penalty contradicts all of these
 23 allegations.

24 The Ninth Circuit has expressly disapproved of the use of a 100% violation
 25 rate without evidentiary support. *See Garibay*, 539 Fed.Appx. at 764. In *Garibay*, the
 26 plaintiff alleged the defendant failed to timely pay all earned wages at termination.
 27 Id. The defendant attempted to support its calculation of the amount in controversy
 28 with a “declaration by [defendant’s] supervisor of payroll, which sets forth only the

1 number of employees during the relevant period, the number of pay periods, and
 2 general information about hourly employee wages.” *Id.* Then, the defendant assumed
 3 each employee would be entitled to the maximum statutory penalty, but failed to
 4 support that assertion with evidence. *Id.* Accordingly, that Court found that “the
 5 defendants rel[ied] on speculative and self-serving assumptions about key unknown
 6 variables.” *Id.* Here, Defendant does not even proffer a declaration in support of its
 7 assumptions. Instead, Defendant’s assumption that each and every former employee
 8 suffered waiting time penalties entitling them to penalties for the entire 30-day period
 9 is neither supported by the FAC nor any extrinsic evidence before the Court. Such
 10 drastic assumptions, when unsupported by the language of the pleadings, are clearly
 11 unreasonable and do not support a finding that the amount-in-controversy
 12 requirement under CAFA has been met. *See, e.g., Vasserman, supra*, 65 F.Supp.3d
 13 at 978. In short, nothing in Plaintiffs’ FAC nor that Defendant has proffered supports
 14 any assumed violation rate (much less an overwhelming 100% rate), including thirty
 15 (30) days’ penalties, 4,790 former employees, and an \$12.83 average hourly wage
 16 rate for each. Thus, because there is no basis whatsoever for this calculation, it must
 17 also be disregarded and cannot support Defendant’s aggregate calculation of the total
 18 amount in controversy.

19 Moreover, as discussed, Defendant must demonstrate that its method of
 20 calculation is based on a representative sample from admissible data, from which it
 21 “extrapolate[s] ... for the entire class.” *Dobbs, supra*, 201 F.Supp.3d at 1189 (citing
 22 *LaCross v. Knight Transp. Inc.*, 775 F.3d 1200, 1202-03 (9th Cir. 2015)). Here,
 23 Defendant has not presented *any* evidence, much less evidence that contains
 24 statistical analysis and extrapolated calculations. As in *Dobbs*, Plaintiffs’ FAC
 25 alleges Defendant violated Labor Code Sections as a “pattern and practice,” but does
 26 not allege uniform violations. [FAC, ¶ 5, 45, 46, 47.] Despite the FAC’s language,
 27 Defendant assumes a 100% violation rate. This assumption is purely speculative, as
 28 is the purported amount-in-controversy derived from Defendant’s speculation.

1 Here too, Defendant disregards the consistent use of limiting language in the
 2 FAC. Defendant misconstrues the FAC to mean that each and every former employee
 3 was not paid final wages due at termination, and that each and every former employee
 4 is owed the maximum penalty pursuant to California Labor Code section 203.
 5 However, nothing in Plaintiffs' FAC nor that Defendant has proffered supports any
 6 assumed violation rate (much less an overwhelming 100% rate). Thus, because there
 7 is no basis whatsoever for this calculation, it must be disregarded and cannot support
 8 Defendant's calculation of the total amount in controversy.

9 C. **Defendant's Attempt to Balloon the Amount in Controversy with**
 10 **Unsubstantiated Attorneys' Fees is Improper**

11 Defendant seeks to inflate its amount-in-controversy amount by arguing that
 12 25% of the total award is reasonable in a class action involving a common settlement
 13 fund, even though the Ninth Circuit has rejected this very argument as a ground for
 14 removal, holding that "we require a removing defendant to prove that the amount in
 15 controversy (including attorneys' fees) exceeds the jurisdictional threshold by a
 16 *preponderance of the evidence*. We also require the defendant to make this showing
 17 with summary judgment-type *evidence....*" *Fritsch v. Swift Transp. Co. of Ariz.,*
 18 *LLC*, 899 F.3d 785, 795 (9th Cir. 2018) (emphasis added); *see also Garibay, supra*,
 19 539 Fed. App'x at 764-65.

20 Moreover, even if the percentage of attorneys' fees used by Defendant is not
 21 unreasonable in and of itself, it is applied "to valuations of the claims that are
 22 inherently unreasonable, [] so the amount attributed to fees cannot be used toward
 23 the jurisdictional threshold." *Duran, supra*, 2021 WL 3281073, at *3-4; *see also*
 24 *Smith.*, 2016 WL 356020, at * 5 (C.D. Cal. 2016) ("[B]ecause such uncertainty
 25 surrounds Defendant's calculation of damages and penalties, the Court cannot find
 26 that the inclusion of a 25% attorneys' fee ... would necessarily place the amount in
 27 controversy over the \$5,000,000 CAFA threshold."). Because Defendant failed to
 28 substantiate the purported damages it alleged, there is no justification to add a further

1 conjectural 25% fee multiplied by these speculative, unsupported damages on top of
 2 already speculative, unsupported damages. Thus, on this ground, as well, Defendant
 3 cannot bootstrap Plaintiffs into federal court.

4 **D. Defendant's Authorities Are Unavailing**

5 In an effort to support its baseless assumed violation rates, Defendant cites
 6 multiple cases that are clearly inapplicable here. For example, in *Augustus v. ABM*
 7 *Sec. Servs., Inc.*, 2 Cal. 5th 257 (2016) [NOR, ¶ 25, 29], the Supreme Court of
 8 California held that state law required employers to authorize off-duty rest periods
 9 for guards, and requiring guards to remain on call during rest periods, did not satisfy
 10 the employer's obligation to relieve guards from their duties and employer control.
 11 There, a Requirement of employment was for employees to keep their pagers and
 12 radio phones on during rest periods. Plaintiffs successfully argued that the
 13 defendant's uniform *policy* of requiring its employees to remain "on-call" during rest
 14 breaks was actually a *policy* of requiring its employees to remain "on-duty" during
 15 rest breaks — and that such a *policy* violated state law. Here, Plaintiffs do not allege
 16 that Defendant's maintained violative policies.

17 As to *Mejia v. DHL Express (USA), Inc.*, 2015 WL 2452755 (C.D. Cal. May
 18 21, 2015) [NOR, ¶ 25, 29], the complaint at issue had express "policy" language that
 19 is absent from the FAC here. Further, the defendant supported its calculations with
 20 evidence, including multiple declarations, which are not present here. *Mejia* also
 21 cited the holding in *Ibarra v. Manheim Investments, Inc.*, affirming that a "removing
 22 defendant could not assume a 100% violation rate where the plaintiff had alleged
 23 only that the defendant had a 'pattern and practice' of committing wage-and-hour
 24 violations," which directly parallels the FAC here, precluding removal jurisdiction.
 25 [FAC, ¶¶ 5, 45, 46, 47, 48.]

26 Similarly, in *Ford v. CEC Entm't, Inc.*, 2014 WL 3377990 (N.D. Cal. July 10,
 27 2014) [NOR, ¶ 25], the complaint at issue repeatedly alleged that the defendants had
 28 maintained uniform *policies* of meal period and rest break violations, unlike the FAC

here. Considering those allegations, *Ford* stated that a 38% violation rate for meal period and rest break violations may have been reasonable, much less than the 100% violation rate that Defendant misleadingly cites. [NOR, ¶ 25.] However, *Ford* also held that the defendant's assumed violation rates failed when they were “unsubstantiated,” “rested on unsubstantiated assumptions,” were “not adequately grounded in summary data,” and “lack[ed] an evidentiary basis.”

Further, *Ford* accepted a 100% violation rate for only waiting time penalties considering the express “policy” language alleged and only after the defendant submitted sufficient summary data in its opposition to remand. Likewise, for meal period and rest break violations, the Court accepted a 18% violation rate and a 19% violation rate, respectively, but only in consideration of the “policy” language alleged and only after the defendant submitted sufficient summary data. Here, Defendant has not submitted *any* summary-judgement type evidence, nor have Plaintiffs alleged that Defendant maintained a uniform *policy* of violative conduct.

Moreover, in *Jauregui v. Roadrunner Transportation Servs., Inc.*, No. 2:21-CV-04657-RGK-PD, 2021 WL 4100286, *5 (C.D. Cal. Sept. 8, 2021), rev'd and remanded, 28 F.4th 989 (9th Cir. 2022), the defendant argued that a 100% violation rate was appropriate for the waiting time penalties claim “based on Plaintiff’s allegations of ‘policies and practices[.]’” The District Court agreed that upon the allegations, a 100% violation rate was appropriate, but declined to apply the entire 30-day penalty for waiting time penalties based on a lack of evidence, despite the defendant’s proffered declaration from its Senior Payroll Lead. On appeal, the Court held the defendant’s assumed 100% violation rate was not unreasonable but held “[w]here a defendant’s assumption is unreasonable on its face without comparison to a better alternative, a district court may be justified in simply rejecting that assumption and concluding that the defendant failed to meet its burden.” *Jauregui v. Roadrunner Transportation Servs., Inc.*, 28 F.4th 989, 996 (9th Cir. 2022). This is

1 precisely the situation here, where Defendant mischaracterizes the FAC and relies
 2 instead on inapplicable case law.

3 Finally, in *Crummie v. Certified Safety, Inc.*, No. 17-CV-03892-RS, 2017 WL
 4 4544747 (N.D. Cal. Oct. 11, 2017) [NOR, ¶ 32], the complaint alleged that the
 5 defendant engaged in uniform *policies* of violative conduct, unlike the FAC here.
 6 Additionally, the defendant supported its removal and opposition to remand with
 7 summary-judgement type evidence, including multiple declarations, unlike
 8 Defendant here. The Court recognized that “pattern and practice” allegations — like
 9 the allegations in Plaintiffs’ FAC — do not support an assumption of a 100%
 10 violation rate. Further, the Court stated that “[i]f the gravamen of the allegation were
 11 that [defendant] was sometimes tardy in providing final paychecks, then indeed it
 12 would ***not be reasonable to assume*** that nearly all employees did not get their final
 13 paychecks for 30 or more days.” (*Id.* (emphasis added).) This is the case here. The
 14 plain language of Plaintiffs’ FAC, as analyzed above, does not support Defendant’s
 15 assumptions regarding its failure to pay final wages at the time of termination of the
 16 employment.

17 **IV. CONCLUSION**

18 Absent sufficient summary-judgment type extrinsic evidence proffered by the
 19 proponent of removal, there can be no basis for federal jurisdiction. One California
 20 federal court denigrated similar tactics as “a wasteful and silly, but routine, exercise
 21 in mathematical fantasyland.” *Toribio, supra*, 2019 WL 4254935, at *3. Even if
 22 Defendant revised its assumed violation rates further down, any “alternative
 23 calculation [rates] provided by Defendant again does ‘not take the place of
 24 evidence.’” *Vanegas, supra*, 2021 WL 1139743, at *4.

25 Accordingly, Defendant’s NOR fails to establish by a preponderance of the
 26 evidence that the \$5,000,000 jurisdictional threshold under CAFA has been met.
 27 Plaintiffs respectfully request that this Court remand the action back to the state court
 28 in which it belongs.

1 Respectfully submitted,

2 Dated: June 9, 2023

WILSHIRE LAW FIRM

3 By: /s/ Jeffrey C. Bils
4 Jeffrey C. Bils

5 Attorneys for Plaintiffs

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